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CHARLES ELMORE CROPLEY, CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 684

FIREMAN'S FUND INSURANCE COMPANY OF SAN FRANCISCO, CALIFORNIA,

Petitioner,

vs.

MARK McCONNELL,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND SUPPORTING BRIEF

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INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary Statement of the matter involved	1
Grounds of motion for involuntary dismissal	2
Policy Provisions	2
Outline of Evidence	4
Jurisdiction	5
Questions presented	6
Reasons relied on for allowance of writ	6
Brief in support of petition for writ of certiorari	7
Specification of errors	8
Summary of Points	9
Argument	12
Motion for rehearing	15

Table of Authorities

Statutes:

Georgia Code 1933, Section 56-812	10
Georgia Code 1933, Section 56-825	11
Georgia Code 1933, Section 56-831	11

Decisions and Texts

32 C. J. 1092	11
44 C. J. S. 931, Section 223	11
Aetna Casualty & Surety Company v. *Salyers*, 294 Ky. 826; 172 S. W. (2) 635	12
Bergholm v. *Peoria Life Insurance Company*, 284 U. S. 489	10
Boyd v. *Travelers Fire Insurance Company*, 22 N. W. (2) 700 (Neb.)	12
Curtis et al. v. *Girard Fire & Marine Insurance Company*, 190 Ga. 854; 11 S. E. (2) 3	11
Erie Railroad Co. v. *Tompkins*, 304 U. S. 64	6, 8, 9
Fox, Trustee v. *Queeen Insurance Company*, 124 Ga. 948; 53 S. E. 271	11

Page

Great American Insurance Company v. *Gusman*, 80 Ga. Apps., 471, 56 S. E. (2) 319 12
Guaranty Trust Company v. *York*, 326 U. S. 99 9
Gunn v. *Globe & Rutgers Fire Insurance Company*, 24 Ga. Apps. 615; 101 S. E. 691 12
Imperial Fire Insurance Company v. *Coos County*, 151 U. S. 452 10
Knight & Son v. *Superior Fire Insurance Company*, 80 Fed. (2) 311 (CCA 5) 11
Melson v. *Phenix Insurance Company*, 97 Ga. 722; 25 S. E. 191 10
Nalley v. *Hanover Fire Insurance Company*, 56 Ga. Apps. 555; 193 S. E. 623 10
National Safe Deposit Company v. *Stead*, 232 U. S. 58 12
Ohio Hardware Mutual Insurance Company v. *Sparks*, 57 Ga. Apps. 830; 193 S. E. 915 10
Stuart Motor Company v. *General Exchange Insurance Corporation*, 43 S. W. (2) 647 (Tex.) 12
Tow v. *Evans*, 194 Ga. 160, 163; 20 S. E. (2) 922 12
U. S. v. *Southeastern Underwriters Association*, 322 U. S. 533 7

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Court:

The petition of Fireman's Fund Insurance Company of San Francisco, California, respectfully shows to the Court:

A

Summary Statement of the Matter Involved

The action was originally brought in the State Court in Hall County, Georgia, by the respondent as insured under an automobile dealer's open policy of insurance against your petitioner as the insurer for the loss of an automobile

resulting from alleged theft. The case was removed to the Federal Court on the ground of diversity of citizenship. (R. 2)

At the conclusion of the evidence for the plaintiff defendant made a motion for involuntary dismissal under Rule 41(b) which was sustained and the suit dismissed on the ground that under the facts and the law plaintiff had shown no right to relief. (R-73.)

Insured appealed from this judgment and the Court of Appeals for the Fifth Circuit reversed the case. (R-82.) (178 F. (2), 76).

Grounds of Motion for Involuntary Dismissal

The suit was dismissed by the trial Court on the following grounds:

1. Because the evidence disclosed that the involved automobile was not owned by the assured (Mark McConnell) but by E. J. Patterson, doing business as Patterson Motor Company. (R-68.)

2. Because the evidence showed that no proofs of loss were filed as required by the policy and no sufficient facts appeared to support the alleged waiver. (R-67, 4, 6 and 7).

3. Because the evidence showed that the alleged loss of the involved automobile fell within an exception to the coverage of the policy sued on providing that the policy did not cover

> "loss suffered by the insured in case he voluntarily parts with title to or possession of any automobile at risk hereunder, whether or not induced so to do by any fraudulent scheme, trick, device or false pretense or otherwise". (R-67, 8 and 9.)

Policy Provisions

The original policy will be before the Court as an exhibit. (R-79 and 80.)

For convenience, the more pertinent provisions are as follows:

The policy was issued to Mark McConnell at a stated street address in Gainesville, Georgia, insuring under three separate items against

> "fire, lightning and transportation";
> "theft (broad form)"; and
> "windstorm, earthquake, explosion, hail or water".

The subject matter of the policy coverage is as follows:

> . . . "automobiles owned by the insured and held for sale or used in repair service, or as demonstrators". . . .
>
> Under the sheft coverage the policy does not cover . . . "loss suffered by the insured in case he voluntarily parts with title to or possession of any automobile at risk hereunder, whether or not induced so to do by any fraudulent scheme, trick, device, or false pretense or otherwise." (R-8.)

The policy contained the customary provisions as to notice, and proofs of loss, providing in substance that the insured shall

> "file proof of loss with the Company within sixty days after the occurrence of loss, unless such time is extended in writing by the Company, in the form of a sworn statement of the insured, etc." (R-6 and 7.)
>
> The policy further provides that payment for the loss "may not be required nor shall action lie against the Company unless, as a condition precedent thereto, the insured shall have fully complied with all of the terms of this policy nor until thirty days after proof of loss is filed and the amount of loss is determined as provided in this policy." (R-6 and 7.)

The policy also contains the usual provisions requiring the insured to submit to examination under oath on the Company's request.

Outline of Evidence

The named insured was Mark McConnell at a stated street address in Gainesville, where he conducted the business of an automobile dealer.

In addition Mr. McConnell financed one E. J. Patterson who did business under the name of Patterson Motor Company. (R-39.)

Mr. McConnell also did business with others under the name of Dixie Auto Auction Company. (R-32, 33.)

The involved automobile was purchased by E. J. Patterson, doing business as Patterson Motor Company on August 23, 1947, and was paid for by check of the Patterson Motor Company (R-35, 36).

On September 2, 1947, the day of the alleged theft, McConnell and his associates in the Dixie Auto Auction Company were conducting an auction in Atlanta, Georgia, and the involved automobile was registered at this auction in the name of Patterson Motor Company. (R-42, 43.)

It was customary for bidders to try out automobiles at the auction and the parking lot attendant at the auction turned over the involved automobile to a man whom he did not know who came up and asked if the car had been sold and when he learned that it had not, stated that he would like to try it out. This man drove the car off and has not been seen since. (R-51, 54, 21.)

The insurer admitted receiving notice of the alleged loss and after the expiration of sixty days from the date of the alleged loss an adjuster was employed. (R-14.)

The insured alleged a waiver of proofs of loss based on denial of liability (R-4) which waiver was denied by the insurer. (R-5, 6).

The testimony shows that plaintiff's attorneys made demand for payment by a letter dated June 21, 1948, and insurer's attorneys denied liability by letter dated June 30, 1948 (R-16), this denial being predicated on two specific grounds:

First—that the insured had not complied with the conditions of the policy with reference to proofs of loss; and

Second—that the insured had not suffered any loss by theft falling within the coverage of the policy.

Reservation as to other objections or defenses was also made. This correspondence is before the Court as an original exhibit. (R-80.)

The Insurance Company specially plead failure to comply with the requirements as to proofs of loss, and in addition thereto the exclusion clause as to voluntarily parting with possession. (R-6, 7, 8.)

In reversing the trial Court on every ground of the motion for involuntary dismissal, the Court of Appeals failed to quote and follow the applicable provisions of the policy involved and cited no single statute or decision or other authority in support of its decision on each point, excepting only the single decision from the Supreme Court of Georgia announcing the general rule as to liberal construction of policies of insurance. (R-85.)

B

Jurisdiction

Jurisdiction of this petition for the writ of certiorari is conferred upon this Court under the provisions of 28 U. S. C. A., Section 1254.

C

Questions Presented

(a) Can the controlling effect of the decision in *Erie RR Company* v. *Tompkins,* 304 U. S. 64, be avoided by the Court of Appeals by the simple expedient of ignoring applicable statutes and decisions which are controlling in Georgia?

(b) Can the Court of Appeals under the guise of liberal construction refuse to uphold the plaintiff and unambiguous provisions of a policy of insurance?

(c) Can an insured (as owner) recover for the alleged theft of an automobile which is owned by a stranger to the policy of insurance?

(d) Can a waiver of proofs of loss as required by a policy of insurance be predicated on a refusal to pay, made after the expiration of the time provided in the policy within which such proofs must be filed?

(e) Can an insured recover for alleged theft of an automobile, the possession of which is voluntarily surrendered to the alleged thief as the result of false pretense, where the policy contains specific exclusion of loss in such cases?

D

Reasons Relied On for Allowance of the Writ

This Court has said that

> "The modern insurance business holds a commanding position in the trade and commerce of our nation. . . . It has become one of the largest and most important branches of commerce. . . . Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the

occupation or the business of almost every person in the United States." (See U. S. *v.* S. E. Underwriters Association, 322 U. S. 533, 539, 540.)

(a) As this Court observes in the above quoted opinion the insurance business is

"built upon the sale of contracts of indemnity."

The preservation by the Courts of the right of freedom of contract is important generally. It is of paramount importance to the insurance business.

Petitioner respectfully contends that the Court of Appeals in this case has not properly considered and enforced the plain and unambiguous terms and provisions of the contract of insurance here involved.

(b) Petitioner contends further than the Court of Appeals has failed to consider and apply controlling and applicable statutes and decisions of the State of Georgia, which would require a different judgment and decision from that rendered.

Petitioner contends that the Court of Appeals is bound under applicable decisions of this Court to consider and apply the controlling statutes and decisions of the State of Georgia in which State this contract was written. In ignoring such statutes and decisions, petitioner contends that the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision by the grant of the writ of certiorari.

E

SUPPORTING BRIEF

I

The opinion of the Court of Appeals is reported in 178 Fed. (2), 76.

It is believed that the grounds of jurisdiction and statement of the case have been sufficiently covered in the preceding petition.

II

Specification of Errors

The Court of Appeals erred:

1. Because it failed to follow and apply the rule in *Erie RR Company* v. *Tompkins,* 304 U. S., 64-78,

by deciding the questions presented in this case without reference to, or citation of, or consideration of applicable statutes and decisions of the State of Georgia.

2. Because the Court failed to uphold and apply the plain and unambiguous terms and provisions of the policy of insurance involved and erred in undertaking to apply the rule of liberal construction in favor of the insured in the absence of any real ambiguity or room for construction.

3. Because the Court of Appeals held that the insured was entitled to recover for the alleged theft of the involved automobile when it was owned by a stranger to the policy and not by the insured.

4. Because the Court of Appeals held that proofs of loss as required by the policy had been waived, without reference to the pleadings or the pertinent terms of the policy or the applicable and controlling statutes and decisions of the State of Georgia, the Court outlining facts insufficient to sustain a waiver, either under the pleadings or the controlling law.

5. Because the Court undertook to hold that the word "possession" in the exclusion clause involved, was ambiguous and subject to liberal construction as not meaning or

including "temporary custody", and thus completely nullifying the entire exclusion clause.

III

Summary of Points

Point 1. The Court of Appeals was bound to decide this case according to the law of Georgia as found in its applicable statutes and decisions. Failure to cite or consider these authorities does not change the rule.

Erie RR Co. v. *Tompkins,* 304 U. S. 64, 78, holding that

> "Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is no Federal general common law".

Guaranty Trust Company v. *York,* 326 U. S. 99, 109, 110, holding that

> "The intent of that decision (Erie RR Co. *v.* Tompkins) was to insure that, in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the Federal Court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court. . . . Erie RR Co. *v.* Tompkins has been applied with an eye alert to essentials in avoiding disregard of State law in diversity cases in the Federal Courts."

Point 2. The Courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made. The words of the policy must be given the meaning which they ordi-

narily bear and where the intention is clear, there is no room for construction.

Imperial Fire Insurance Company v. *Coos County*, 151 U. S. 452, 462. (See quotation from this decision, R-90);

Bergholm v. *Peoria Life Insurance Company*, 284 U. S. 489, 492;

Royal Indemnity Company v. *Watson*, 61 F. (2) 614, 616 (CCA-5);

Nalley v. *Hanover Fire Insurance Company*, 56 Ga. Apps., 555, 563; 193 S. E., 623;

Melson v. *Phenix Insurance Company*, 97 Ga. 722, 727; 25 S. E. 191;

Wheeler v. *Fidelity & Casualty Company*, 129 Ga. 237, 240 (See quotation from this decision R-91);

Ohio Hardware Mutual Insurance Company v. *Sparks*, 57 Ga. Apps., 830.

Point 3. Where the insured represents himself as owner and is so insured, he cannot recover for loss to property owned by a stranger to the policy. The evidence must disclose that the insured has that interest in the property that he represented himself to have. See Code of Georgia Sections

> "56-812. Interest of Insured Which May Be Subject of Policy.—To sustain any contract of insurance, it shall appear that the insured has some interest in the property or event insured, and such as he represented himself to have. A slight or contingent interest, whether legal or equitable, shall be sufficient, and several having different interests may unite in procuring one policy: so a husband or parent may insure the separate property of his wife or child, the recovery being held by him in trust for them; but a mere expectation of an interest is not insurable."

And

"56-825. Effect of Alienation of Insured Property. An alienation of the property insured and a transfer of the policy, without the consent of the insurer, shall void the policy; but the mere hypothecation of the policy, or creating a lien on the property, shall not void the policy."

32 C. J. 1092;
44 C. J. S. 931, Section 223;
Fox Trustee v. *Queen Insurance Company,* 124 Ga. 948; 53 S. E. 271;
Curtis, et al., v. *Girard F. & M. Insurance Company,* 190 Ga. 854; 11 S. E. (2), 3.

Point 4. Proofs of loss as required by the policy to be filed within sixty days cannot be waived by a denial of liability made after the expiration of said time.

Section 56-831 of the Code of 1933 of the State of Georgia reads as follows:

"56-831. Right of Insurer to Prescribe Regulations As To Notice and Proof of Loss. Every insurer shall have a right to prescribe regulations as to notice and preliminary proof of loss, which shall be substantially complied with by the assured: Provided, the same shall be made known at the time of the insurance, and shall not be materially changed during the existence of the contract. An absolute refusal to pay shall waive a compliance with these preliminaries."

J. T. Knight & Son v. *Superior Fire Insurance Company,* 80 Fed. (2), 311 (CCA 5) holding that

"After the insured has lost the right to sue on a policy by failing to comply with the condition precedent of filing proof of loss within the time allowed, nothing done or omitted by the insurer within that time having caused or contributed to that failure, that right so lost is not revived by the insurer's subsequent denial

of liability. A waiver by an insurer of a fire insurance policy requirement as to filing proof of loss within a stated time does not result from the insurer's denial of liability after the expiration of that time."

(Citing cases from Georgia and other authorities.)

Point 5. In the exclusion clause the ordinary meaning of the word "possession" is clear and unambiguous and affords no basis for the application of the rule of "liberal construction" in favor of the insured, and the exclusion should be upheld.

Gunn v. *Globe & Rutgers Fire Insurance Company,* 24 Ga. Apps., 615; 101 S. E. 691;

Great American Insurance Company v. *Gusman,* 80 Ga. Apps., 471; 56 S. E. (2d) 319;

Ætna Casualty & Surety Company v. *Salyers,* 294 Ky. 826; 172 S. W. (2) 635;

Stewart Motor Company v. *General Exchange Insurance Corporation,* 43 S. W. (2) 647 (Tex.);

Boyd v. *Travelers Fire Insurance Company,* 22 N. W. (2) 700 (Neb.).

The case of *National Safe Deposit Company* v. *Stead,* 232 U. S. 58, is not in point in that the Court was there considering the meaning of the word "possession" in a statute. Compare *Tow* v. *Evans,* 194 Ga. 163; 20 S. E. (2), 922.

IV

Argument

Point 1. It appears that by its decision in *Erie RR Company* v. *Tompkins, supra,* this Court intended

"to *insure* that, in all cases where a Federal Court is exercising jurisdiction solely because of the diversity of citizenship, the outcome of the litigation in the Fed-

> eral Court should be substantially the same . . . as it would be is tried in a State Court."

Also, that this Court is "alert to essentials" in avoiding disregard of state law in diversity cases in the Federal Courts.

The instant case presents an instance of a flagrant and complete disregard of the law of Georgia as applicable to the questions that were presented by this case in the trial Court.

Point 2. In the *Southeastern Underwriters Case, supra,* this Court has correctly recognized the magnitude and importance of the insurance business in this Nation, and has recognized that it is

> "built upon the sale of contracts of indemnity." (322 U. S. 539, 540.)

If the plain and simple words and provisions of these contracts may be ignored or

> "liberally construed"

out of existence, contrary to all reason or authority, the insurance business is at the complete mercy of the Court.

This undoubtedly is a small case in dollars but it looms large as a dangerous precedent.

The Court here ignores the pleadings and the contract as to ownership and misapplies the evidence; it ignores the pleadings, the Georgia law and the contract provisions as to time within which proofs of loss are required, and consequently misapplies the evidence; it ignores the authorities and reads into the word "possession" an ambiguity and thereupon "liberally construes" the exclusion clause out of the policy.

Point 3. The evidence shows that Mark McConnell conducted his own personal business as an automobile dealer

at an address stated in the policy. He was also a partner in an auction business. He was also financially interested in the business of one Patterson doing business as Patterson Motor Company. He was insured however only as Mark McConnell at the designated address of his own personal business.

The authorities hereinabove cited are clear to the effect that insurance is a personal contract and the insured must have an insurable interest in the subject matter of the policy,

"and such as he represented himself to have".

The insured was represented as the owner in his policy. His complaint alleged that he was the owner of the involved automobile. The evidence showed that it was owned by Patterson Motor Company.

The case was properly dismissed by the trial Court on this ground.

Point 4. The insured alleged that proofs of loss were waived by the denial of liability by the Company. (R-4.) This denial took place many months after the alleged loss and under the decisions both of the Courts of Georgia and of the Court of Appeals for the Fifth Circuit, (See *Knight* case, *supra*) this refusal to pay was wholly ineffective.

The Court of Appeals' opinion on this point is in the teeth of applicable decisions which are controlling.

Point 5. There is no Georgia authority directly involving the precise exclusion clause here involved.

It is submitted that reason and authority generally uphold this precise exclusion clause. The subject is fully covered in the Nebraska case cited (*Boyd* v. *Travs. Fire Insurance Company, supra*).

Under authority of the *Gunn* case (*supra*) no theft was shown by the evidence in the case at bar.

Under authority of the *Gusman* case (more recently decided) there was a theft under the evidence in the case at bar, but it was clearly eliminated from coverage by the exclusion clause, and the *Gusman* case indicates that no ambiguity as to the meaning of the word "possession" exists in the minds of the Georgia Court as covering the kind of a transaction here involved.

V

Motion for Rehearing

The Court's attention is called to the motion for rehearing (R-87-100) in which petitioner emphasized all of the foregoing points to the Court of Appeals without relief.

Petitioner has filed as appendices hereto ten copies of petitioner's brief before the Court of Appeals.

WHEREFORE, YOUR PETITIONER RESPECTFULLY PRAYS THAT a writ of certiorari issue under the seal of this Court, directed to the Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, Number 12934, Mark McConnell, Appellant, versus Fireman's Fund Insurance Company of San Francisco, California, Appellee, and that the judgment and decision of the Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief as to the Court may seem meet and proper.

FIREMAN'S FUND INSURANCE COMPANY
SAN FRANCISCO, CALIFORNIA,
By ALEX. W. SMITH,
Counsel for Petitioner.

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Supreme Court of The United States

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FIREMANS FUND INSURANCE COMPANY OF SAN FRANCISCO, CALIFORNIA,

Petitioner,

vs.

MARK McCONNELL,

Respondent.

On the Brief:

Wheeler, Robinson & Shurtz,

Sacramento, Calif.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1949.

No. 684

FIREMAN'S FUND INSURANCE COMPANY,
plaintiff,

v.

MARK McCONNELL, respondent.

Petition for writ of certiorari to review a decision of the United States Court of Appeals, Fifth Circuit. Brief in opposition to the grant of

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QUESTION INVOLVED

This was a suit between private parties with no matter of public concern at issue. It was an action at law on an ordinary insurance policy upon which only a money judgment was sought.

A casual reading of the petition reveals that it does not present "special and important reasons" why this Court should review the decision complained of.
Rule 38 (5).

For this Court to review all cases decided by the United States Courts of Appeal of a private nature in-

volving no more important principle than is here presented would be to assume a burden rendering it impossible to discharge the grave responsibilities placed upon it by the Constitution, laws and demands of this Nation.

It is a sound and necessary policy that power to review decisions of Circuit Courts of Appeal be exercised sparingly and only in cases of gravity and importance. The whole history of our judicial system and the burdens resting upon this Court demonstrate this.

> **Forsyth v. City of Hammond,** 166 U. S. 504, 41 L ed. 1095.

In the matter of Woods, 143 U. S. 202, 36 L ed. 125, it was held:

> "Whether the law of Minnesota that a judgment of dismissal is not a bar to a second suit for the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment, was properly applied on the trial of a case, are not questions of such gravity and importance as to require the review by this Court of the conclusions of the Circuit Court of Appeals in reference to them."

> "When a judgment of the Circuit Court of Appeals should be certified to this Court for review—review of the judgments of the Court should be exercised sparingly."

> Ex parte: **Lau Ow Bew,** 141 U. S. 583, 125 S ct 43, 35 L. E. 868.

The petition complains that the Court of Appeals erred in not affirming a judgment of the trial Court because:

1. The evidence disclosed that an automobile involved was not owned by the assured, Mark McConnell, but was owned by another.

2. Because the evidence showed that no proofs of loss were filed as required by the policy and no sufficient facts appeared to support an alleged waiver

3 Because the evidence showed that the alleged loss of the automobile sued for fell within an exception to the coverage of the policy sued on.

It is plain to be seen that each point relied on for the grant of a writ involves a consideration of the evidence and a fact.

The Supreme Court of the United States will not grant a writ of certiorari to review evidence and discuss specific facts.

United States v. Johnson, 268 U. S. 220, 45 S ct. 496, 69 L ed 925,

General Talking Pictures Corporation v. Western Electric Co., 304 U. S. 175, 58 S ct. 849, 82 L ed. 1273,

Southern Power Company v. North Carolina Public Service Co., 263 U. S. 504, 44 S ct. 164,

PETITION PRESENTS NOTHING FOR CONSIDERATION BY THIS COURT.

"The petition shall contain a summary and short statement of the matter involved; a statement particularly disclosing the basis upon which

it is contended that this court has jurisdiction to review the judgment or decree in question (See Rule 12, par. 1); the questions presented; and the reasons relied on for the allowance of the writ."

Rule 38 (2).

A failure to comply with these requirements will be sufficient reason for denying the petition.

See **United States v. Rimer**, 220 U. S. 547; **Furness, Withy & Co. v. Lang Tsze Insurance Assn.'** 242 U. S. 430; **Houston Oil Company v. Goodrich,** 245 U. S. 440; **Layne & Bowler Corporation v. Western Well Works**, 261 U. S. 387, 392; **Magnum Import Co., v. Coty**, 262 U. S. 159, 163; **Southern Power Company v. North Carolina Public Service Co.,** 263 U. S. 508.

Clearly the instant petition fails to comply with the rule cited.

See what is contained in the petition under "Specification of errors", and "Summary of points"

The case originated in the City Court of Hall County. (R. 2)

It was removed to the District Court of the United States upon the sole ground of diversity of citizenship. In such a case the decision of the Court of Appeals is final and not subject to review by this Court.

Wyman v. Wallace, 201 U. S. 230, 26 S ct. 495, 50 L ed 738;

Huguley Manufacturing Company v. Galeton Cotton Mills, 184 U. S. 290, 22 S ct. 452, 46 L ed 546;

See also **Begg v. New York**, 262 U. S. 196, 43 S ct. 513, 67 L ed 946.

Respectfully submitted,

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